IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA-10-0035

PATRICK CHEFF,
Plaintiff/Appellee/Cross Appellant

v.

BNSF RAILWAY COMPANY, a Corporation
Defendant/Appellant/Cross Appellee

BRIEF OF APPELLEE/CROSS-APPELLANT, PATRICK CHEFF

ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT
CASCADE COUNTY CAUSE NO. DV-08-1121
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I. STATEMENT OF ISSUES

Direct Appeal

1) Did the district court err by concluding based on the undisputed evidence that BNSF's release should be set aside for either mutual mistake of material fact regarding the nature and extent of Pat Cheff's injury, misrepresentation regarding the date to which medical coverage would be extended, or for lack of consideration when he was led to believe that he was bargaining for medical benefits to which he was already entitled?

2) Did the district court err when it prohibited the cross examination of a lay witness with inadmissible hearsay records for which no foundation had been laid and which were inadmissible to prove apportionment or causation based on this court's prior decisions after the lay witness, outside the presence of the jury, made clear that he had no explanation for or knowledge of the records and the plaintiff's doctor said that they did not change his opinion.

3) Can a person who receives partial advance payment of an amount to which he is later found to have been entitled be charged interest on that amount prior to the final adjudication of his case?

Cross Appeal

1) Did the district court err under FELA law when it submitted the issue of contributory negligence to the jury?

2) Did the district court err when it offset the plaintiff's damage award by a previous settlement amount when it could not be determined from the language of the previous settlement agreement whether it was paid for the same damage awarded by the jury.

II. STATEMENT OF THE CASE

The plaintiff, Pat Cheff, filed an amended complaint against the BNSF Railway Company (BN) pursuant to 45 U.S.C. §51, known as the Federal Employers Liability Act, to recover damages for personal injuries sustained during the course of his employment. (Docket Entry (Doc.) 7, ¶3) He alleged that on January 14, 2006, while entering the locker area provided on BN's railroad yard in Whitefish, he fell and injured his back due to the unsafe conditions of the entryway which caused the accumulation of ice and snow, (¶4) that BNSF was negligent for failing to provide a safe place to work (¶5), and that its negligence caused injuries for which he was entitled to damages (¶6).

He also alleged that on June 22, 2006, he was induced by BNSF to sign a release and settlement agreement but that the agreement was void for lack of consideration, mutual mistake about the extent and nature of his injuries, and because it was fraudulently induced. (¶9) He asked that the settlement agreement be set aside.

Among its affirmative defenses, BNSF alleged that Mr. Cheff's claim was

barred by the prior release and settlement agreement, that he injured himself weightlifting or in some other fashion while not working for BNSF, and that damages should be apportioned. (Answer, pp. 2-3)

BNSF moved for summary judgment, but offered no sworn testimony or admissible evidence in support. (Doc. 9, Exhs. B and C)

Pat Cheff's brief in opposition to BNSF's motion and in support of his cross motion for summary judgment was supported by his affidavit, the affidavit of his healthcare provider, deposition testimony from Greg Keller, BNSF's claims manager, and exhibits identified in the Keller deposition. (Doc. 24, 25, and 23 respectively)

On June 16, 2009, the district court granted plaintiff's cross motion for summary judgment based on its conclusions that:

1) the undisputed facts established a mutual mistake of fact regarding the nature and extent of his injury;

2) constructive fraud had been established based on BNSF's representation that his medical coverage would be continued beyond the date to which it actually was continued; and

3) because Mr. Cheff bargained for and was told that he was receiving extended medical benefits to which he was already entitled by the terms of his collective bargaining agreement, there was a partial failure of consideration. (Doc.

58, App. 1, pp. 1, 2)

On March 13, 2009, pursuant to court order (Doc. 17, p. 1), witness lists were exchanged between the parties. BNSF did not identify any expert opinions, nor did it identify any expert witnesses in response to interrogatories submitted by Pat Cheff. (App. 2, p. 4)

Mr. Cheff then moved in limine to exclude evidence from medical records relating his injury to any event other than his fall at work for the reason that no foundation had been laid through discovery for the admission of the records (Doc. 55, p. 5), and that no expert opinions had been identified in response to discovery which would permit a jury to apportion damages or enable BNSF to prove the injury was caused other than as alleged. (Doc. 55, p. 9) BNSF responded that the evidence was admissible to prove apportionment. (Doc. 56, pp. 8 and 9)

In a well reasoned opinion, the district court granted Pat Cheff's motion to exclude medical records for which no foundation had been laid for the reason that proof of causation requires expert opinion testimony (Doc. 62, App. 3, p. 13), apportionment requires expert testimony (pp. 10-11), no expert witness had been disclosed by the defendant (pp. 16-17), the court has broad discretion to avoid unfairness by remedying insufficient or incomplete disclosure (p. 17), and that pursuant to *Olson v. Shumaker Trucking and Excavating Contractors, Inc.*, 2008

MT 378, 347 Mont. 1, 196 P.3d 1265, it would be unfair to allow BNSF to circumvent disclosure requirements and its burden of proof on causation or apportionment by offering otherwise inadmissible records through ostensible cross examination of the plaintiff (pp. 18-21), who had already denied making the statements and had no explanation for why they appeared in his records. (Cheff Depo., App. 4, pp. 43-44)

Following trial, the jury returned a verdict finding Pat Cheff was injured by BNSF's negligence, that he sustained damages in the amount of $1.6 million, and that those damages should be reduced based on comparative fault of 15 percent. (Doc. 131, App. 5)

Judgment was entered for the amount of $1,360,000. (Doc. 139) Post trial, the district court entered its order allowing offset for the $300,000 previously paid, denying interest to BNSF on that amount, and denying a new trial. (Doc. 168, App. 6) This appeal and cross appeal followed. (Doc. 173, 178)

III. STATEMENT OF FACTS

In support of his motion for summary judgment to set aside the release, Pat Cheff submitted his own affidavit (Doc. 24), an affidavit from his healthcare provider which identified the relevant records (Doc. 25), and the sworn testimony of BNSF's claim supervisor, Greg Keller (Doc. 23, pp. 8-11). They are attached hereto as App. 7, 8, and 9. They established the following:

Pat fell on icy railroad property and injured his back in mid-January 2006. (Cheff Aff. ¶1) (It was confirmed at trial that he reported his injury the same day to John Bartlett, a coworker. (Tr. 492)) At first, he did not think he had been seriously injured. He sought chiropractic care a couple days after his accident. (¶4) Within days of his injury, he reported the occurrence to Doug Schuch, the Whitefish Train Master who was his supervisor. (¶5) (This was confirmed by Schuch at trial. (Tr. 362, 363)) He did not at that time report it as a work-related injury based on the assumption that it was a short-term problem, that he would fully recover and that reporting a work-related injury would adversely affect his employment. (¶5)

By January 27, 2006, he was referred to an orthopedic surgeon, Dr. David Sobba, who, after having MRI studies done, concluded that he had herniated discs in his lower back and treated him conservatively, including a referral for physical therapy. (¶6)

While Pat was being treated conservatively, he also discussed his accident with Schuch who told him that he had been advised by his superior that if Pat reported a work-related injury at that time he would be fired for not having reported it within the required timeframe. (¶7) (This was also confirmed at trial by Schuch. (Tr. 377, 378))

When conservative treatment was unsuccessful, Pat was referred to Dr.

Robert Hollis, a Kalispell neurosurgeon, and was first seen in his office on June 13, 2006, when he was advised that surgery would be necessary to prevent further nerve damage. (¶¶8, 9) Following that conversation, Pat went to Doug Schuch's office where, on June 15, 2006, he filled out a personal injury report form. At that time, it was again suggested that he may be terminated for late reporting. (10) (Confirmed by Schuch at Tr. 378, 379)

Pat met personally with Dr. Hollis on June 20th. During that meeting, surgery on his lower back was scheduled for June 30, 2006. He was advised that surgery would decompress the nerve roots in his lower back and in all probability provide excellent relief. (¶14)

The next day, Pat Cheff met with Greg Keller, a BNSF claims manager, by whom he was interviewed at length and with whom he visited the accident scene. Part of Keller's interview was recorded. A substantial part of it was unrecorded. (See Keller Depo, p.60, lines 8-20)

According to Pat, he was advised by Keller on either the 21st or 22nd that he had three options:

> a. He could be suspended for thirty days for late reporting an injury during which a formal investigation would be conducted and then it could take five years for him to get his job back;
>
> b. He could be immediately terminated with an investigation to follow; or,

c. He could fully settle his claim and waive any rights to future employment for the amount of $300,000.00. He was given one and one half hours to make a decision. (¶15)

Pat said he was also told by Keller that if he signed the release agreement BNSF would extend his medical coverage to January 1, 2010. He was not advised that he had a right to extended medical coverage beyond his last date of employment without signing the agreement. In fact, his family's benefits were terminated on January 1, 2008, and his terminated on January 1, 2009 – the date to which they would have been extended had he never signed a settlement agreement. (¶16 and the Railroad Employee National Health and Welfare Plan attached to Cheff Aff. as Exh. 1, App. 8)

Pat accepted Keller's offer on June 22, 2006, and signed the agreement prepared by BNSF. (¶17) He learned subsequent to execution of the agreement that late reporting of a work-related accident is not an offense for which an employee can be terminated or even suspended. (¶22 and Policy for Employee Performance Accountability attached to Cheff Aff. as Exh. 2, App. 8) He also learned that the extended health care benefits which he thought had been negotiated were something he was entitled to without entering into a settlement agreement. (¶16)

Furthermore, following settlement and further diagnostic studies, he was

advised by Dr. Hollis that he was not, in fact, a candidate for surgery due to the possible instability of his spine at the surgery site and difficulty fusing his vertebrae because of the abnormal configuration of his vertebrae in the lumbar area. (¶19) That was not something he had been told before. Because he cannot have the surgery which both he and Keller assumed he would have, his condition worsened and was different than it was anticipated it would be. (¶¶20, 21) Had he known he was not a candidate for surgery and the relief he was told it would provide, he would not have accepted the amount he was paid by BNSF in settlement of his FELA claim. (¶21)

Griffin Affidavit

Also provided in support of Pat Cheff's motion was the affidavit of Tacey E. Griffin, PA-C, a physician's assistant to Dr. Hollis. Her affidavit authenticated the medical records from Dr. Hollis' office. (Griffin Aff., ¶1, App. 8) There was no objection to that foundation.

They demonstrate that Pat Cheff was first seen at the office on June 13, 2006, where he was diagnosed with a low back disc and nerve injury and received a recommendation that he have "sooner rather than later surgical decompression." The record indicates that the examiner felt "It will be important to decompress his nerve root, as to prevent further motor neuropathy. Dr. Hollis is in agreement with the above impression and plan..." The examiner also felt that the injury was work-

related, but explained that Pat was reluctant to report it as work related for fear of being fired or suspended. (App. 8, Exh. A)

The records indicate that Pat was seen by Dr. Hollis on June 20, 2006, the day before he met with Mr. Keller. Dr. Hollis assessed a "probable chronic L4 radiculopathy following occupational injury." He stated that Mr. Cheff could benefit through surgical intervention to decompress the nerve roots and that a later fusion may be necessary. The record indicates surgery was scheduled for June 30, 2006. (App. 8, Exh. A)

Pat met with Greg Keller the following day. Dr. Hollis' records and recommendations were provided to Keller two days later and on the day on which the records were provided, Pat Cheff's case was settled based on the mutual understanding that surgery would be done on June 30th to avoid further nerve damage, and provide pain relief and functional benefit.

Pat Cheff did not have surgery on June 30th due to concerns about his EKG results. Those concerns were later resolved. (Cheff Aff., ¶18) However, when his condition continued to worsen, a third MRI study was ordered by Dr. Hollis on January 23, 2007, in anticipation that surgery would be re-scheduled. As a result of this study, Dr. Hollis' February 20, 2007, note indicates that due to Pat Cheff's "sagittally oriented facets and short lamina syndrome" compounded by the fact that he has "congenitally small pedicles that are at maximum diameter of less than 4.5

mm in size," fixation for stabilization would be precarious and therefore it would be difficult to fuse his spine if instability developed after decompression. (App. 8, Exh. A)

Tacey Griffin's August 2, 2007, note indicates that when Pat Cheff was last seen by Dr. Hollis on February 20, 2007, Dr. Hollis did not feel that surgical intervention was appropriate. By then, according to the records, Pat was taking multiple medications, concerned about living in a vegetative state, and continued with low back pain, radiation into his left extremity, and was experiencing weakness and buckling in his left foot. In spite of these findings, Dr. Hollis continued to believe at that point in time based upon anatomical findings discovered after settlement of this case that "Surgical intervention is not in this gentleman's best interest." (App. 8, Exh. A)

In her letter dated March 20, 2008, attached as Exhibit B to her affidavit, Griffin explained that Mr. Cheff was given the impression at his initial evaluation that a simple decompression would benefit him but that upon re-imaging and review, anatomical variations changed Dr. Hollis' surgical recommendations.

These were the actual facts submitted to the district court. They were uncontroverted. BN's arguments on appeal that Pat has always known his condition and chose not to have surgery but that it will still ultimately be performed is not based on the record and is mere attorney spin. While he still may

require surgery, it will be of an entirely different nature than originally planned and only in an emergent situation. (Hollis Depo., pp. 47, 48, 54, App. 10)

Testimony of Greg Keller

Greg Keller works for the Defendant as a claims manager (Keller Depo, p.7) and in June of 2006 was responsible for Montana (p. 9).

Keller interviewed Pat Cheff on June 21, 2006. He believes that he was provided with medical records the day following his interview which corroborated what he had been told. (pp. 26-27) Other than the medical records brought to him by Pat Cheff on June 22nd, he gathered no additional records on his own (p. 34) nor did he interview any doctor about Pat Cheff's condition. (p. 34) The last record with which he was provided prior to execution of the settlement agreement was Dr. Hollis' record dated June 20, 2006, (pp. 35-36) and, according to the settlement agreement prepared by Keller, both parties believed that surgery was necessary and would involve a laminoforaminotomy at his third and fourth lumbar vertebrae. (p. 43) He stated that all he knew was what was in the reports included in his file. (p. 130)

Keller denied telling Pat that he would be disciplined for late reporting. (p. 90) However, Exh. No. 11 to his deposition included notes prepared by Doug Schuch. The note dated May 17, 2006, states that Schuch advised Cheff, "If he turn (*sic*) it in, it would be late reporting and subject to being fired through pepa

policy."

Keller acknowledges telling Cheff that medical coverage could only be extended for six months to a year (p. 67) (a full year and a half to two years less than actually provided in the Employee Benefit plan) and that the termination date in the settlement papers was post-dated to protect insurance coverage. (pp. 67-69) Three things are clear from Keller's testimony:

1) Neither he nor Pat Cheff were aware of Pat's actual medical condition on June 22, 2006;

2) Pat Cheff was misinformed about the consequences of filing a formal claim for his injury later than normally required by at least his direct supervisor; and,

3) Pat Cheff was misinformed that he would benefit from signing a settlement agreement by extension of his insurance coverage.

These facts were undisputed. While BN has parsed and spun the record to fashion new arguments on appeal, it provided no contradictory facts in response to Pat Cheff's motion for summary judgment (Doc. 34).

Facts Alleged by BNSF

On p. 2 of its brief, BNSF contends that Pat Cheff did not report his fall to anyone. That is not correct. (Cheff Depo., p. 41, ls. 7-12) He advised his coworker, John Bartlett, on the day the accident occurred. (Cheff Depo., p. 41, l. 18-p. 42, l. 9 and p. 108, ls. 5-8) He advised his supervisor, D. L. Schuch, of his

fall within days following the occurrence (p. 54, ls. 11-24), and he filed a formal injury report as soon as he learned that he would need surgery. (p. 94, ls. 14-17)

BNSF argues that Pat did not consider the condition a hazard (p. 2). However, he explained in his deposition that he did not think it was a safe condition (p. 173, l. 25-p. 174, l.1), and he pointed out in his June 15, 2006, injury report that the area where he fell needed improvements to be made safe. (p. 98, l. 19-p. 99, l. 6)

On p. 2, BNSF contends that the story he told to his doctors was significantly different than what he told the jury. That is also incorrect. The first healthcare provider that he saw was a chiropractor who was never asked by BNSF what he was told. (Doc. 24, ¶4) The first physician that he saw was Dr. David Sobba, who was told that Pat injured his back when he slipped. (Doc. 125, Exh. 49-1) and Dr. Hollis was told exactly how the accident happened. However, even prior to that time, within days of his injury, Pat Cheff took his supervisor, Doug Schuch, to the site of his fall, explained what happened and that as a result of his fall, he injured his back. Schuch confirmed the conversation. (Tr. 362, 363, 364, and 441) This is exactly the jury was told.

On p. 6 of its brief, BNSF contends that Pat Cheff talked to attorneys before electing to settle his claim. Neither is that correct. His actual testimony was that he

called an attorney but did not attend the appointment (Cheff Depo., p. 136, pp. 157-159, App. 4)

On p. 6, BNSF contends that Pat knew his injury might get worse and that he was permanently disabled. Neither is that true. When asked whether he understood that his injuries might get worse or better, he answered, "no." He stated that what he understood was that if he did not have the surgery that had been recommended his condition might remain the same or he might sustain more nerve damage, but that he understood with surgery, which he planned to have done, he would get better. (Cheff Depo., p. 161, ls. 3-24)

BNSF's contention that he believed he was permanently disabled is based on language in the release that its claims department authored which states ". . . I, Pat J. Cheff, agree to never return or attempt to return to railroad work in any capacity with BNSF . . . because of the permanent injuries and disabilities I sustained . . ." However, agreeing not to return to work for BNSF is not the same as an acknowledgement of total disability and BNSF's argument completely ignores Pat's testimony to the contrary. (Cheff Depo. pp. 140, 146)

On p. 6, BNSF contends that because Pat knew he had a herniated disc and "short pedicles" he was aware of his condition and the seriousness of his injury was clearly understood. However, it is not correct that he merely had a herniated disc superimposed on short pedicles. He had a herniated disc which required

surgical decompression to avoid further debilitating nerve injury and was later found based on improved MRI technology to have multiple disc injuries superimposed on "sagittally oriented facets and short lamina syndrome" compounded by the fact that he has "congenitally small pedicles that are at a maximum diameter of less than for 4.5 mm in size" making fixation for stabilization precarious. (Hollis note dated 2/20/07, Exh. B, Doc. 25, App. 8) That was not what Dr. Hollis believed on June 20, 2006.

On p. 7 of its brief, BNSF touts that Pat wrote in his own hand "I have read and fully understand the above release." Pat actually explained that he was told to write the quoted portion of his release by Greg Keller (Cheff Depo., p. 151, ls. 13-21) and that without it there would be no agreement. (Cheff Depo., p. 151, ls. 22-25)

On p. 9, BNSF states that Dr. Hollis has not recommended surgery as recently as December 30, 2008, but still believes it will be necessary in the future. The reason he was not recommending surgery at that time has already been explained. It was re-emphasized by Dr. Hollis during his trial testimony when he stated that the configuration of Pat's vertebrae would not permit insertion of the screws necessary to do a fusion (Hollis Depo., p. 45) and that he would have to fuse the entire lumbar and thoracic spine and pelvis to stabilize the spine (Depo., p. 45). Therefore, surgical intervention is not in Pat's best interest absent an

emergent situation (Depo., pp. 47, 48), which may be the situation in the future even though it is fraught with risk and will be a massive undertaking. (Depo., p. 54)

On p. 10, BNSF contends that when told about weightlifting, Dr. Hollis changed his opinion about the cause of Pat Cheff's back injury. That is not correct as illustrated by the quoted part of Dr. Hollis' testimony on p. 29 of this brief.

Finally, on p. 10, BNSF contends that Cheff's counsel took advantage of the court's order in limine by arguing to the jury that BNSF had been unable to develop information contradicting his story. What it fails to point out is that the argument had nothing to do with the cause of Pat Cheff's injury. It was in response to BNSF's suggestion that Pat's version of how the accident occurred should be disbelieved (Tr. 919, 920, 931, and 935), and was made without objection.

VI. ARGUMENT

1. RELEASE AGREEMENT

Standard of Review

This court reviews a district court's grant or denial of a motion for summary judgment de novo and applies the same Rule 56, M.R.Civ.P., criteria as applied by the district court. *Smith v. Burlington Northern & Santa Fe Ry.*, 2008 MT 225,

¶10, 344 Mont. 278, 187 P.3d 639; *Olszewski v. BMC West Corp.*, 2004 MT 187, ¶9, 322 Mont. 192, 94 P.3d 739.

Once the moving party has met its burden, the party opposing summary judgment must present material and substantial evidence sufficient to raise a genuine issue of material fact. Otherwise summary judgment in favor of the moving party is proper. *Peterson v. Eichorn*, 2008 MT 250, ¶¶36-37, 344 Mont. 540, 189 P.3d 615. A responding party must controvert a motion for summary judgment with admissible evidence, otherwise the facts proven by the moving party will be deemed established. *Hughes v. Lynch*, 2007 MT 177, ¶19, 338 Mont. 214. 164 P.3d 913. Facts developed at trial and not before the court at the time of its summary judgment order cannot form the basis for error. *Reaves v. Reinbold*, 189 Mont. 284, 291 615 P.2d 896, 900.

Summary of Argument

The self-serving language inserted in the release agreement by its authors does not determine its enforceability. Release agreements which are based on mutual mistake of material fact, fraud, or lack of consideration will not be enforced. In this case, all of those conditions were proven by the uncontroverted affidavit and deposition testimony submitted by the plaintiff.

Discussion

The nature of Pat Cheff's condition was not fully known at the time of his

settlement nor could it have been anticipated that further physical deterioration was unavoidable due to his ineligibility for surgical treatment. Federal authorities establish that under these circumstances and for the additional reasons relied on by the district court, he was entitled to have the release agreement set aside and proceed with his claim against BNSF.

In *Counts v. Burlington Northern Railroad Company*, (9th Cir. 1991) 952 F.2d 1136, the court stated in relevant part that:

> "FELA releases may be set aside on the grounds of **fraud** (citations omitted), **lack of consideration**, (citation omitted), and **mutual mistake** (citation omitted). The Supreme Court has also stated that '[u]ntainted by fraud or overreaching, full and fare compromises of FELA claims do not clash with the policy of the act.'" *South Buffalo Ry. Co.*, 344 U.S. at 372, 73 S. Ct. at 343. This court has also acknowledged that a release should not be upheld if 'any element of fraud, deceit, oppression, or **unconscionable advantage** is connected with the transaction.' (citation omitted)...". 952 F.2d at 1142.

In *Faulkenberry v. Kansas City Southern Railway Company*, (Okla, 1979) 602 P.2d 203, the issue was whether the release agreement executed in that case to resolve an FELA claim was assailable under FELA law. The Oklahoma Supreme Court acknowledged that federal law was determinative, recognized that fraud can be actual or constructive, and defined each similarly to the manner in which they are defined in Montana. (see §§28-2-405, 406) (602 P.2d at 206, FN6 and 8). It concluded that while no intent to deceive had been established an employee who

entered into a settlement agreement without a correct understanding of his rights established a constructive fraud. 602 P.2d at 208.

In *Brophy v. Cincinnati New Orleans and Texas Pacific Railway Company* (S.D. Ohio, 1994) 855 F. Supp. 213, the district court held that pursuant to 45 U.S.C. § 55, a release agreement cannot exempt an employer from liability for an injury about which the employee was unaware at the time the agreement was executed so long as the employee's unawareness is reasonable. 855 F. Supp. at 217. For additional authorities setting aside settlement agreements which relate to claims unknown to the plaintiff at the time of his injury and for failure to adequately identify those benefits to which the plaintiff was actually entitled, see *Babbitt v. Norfolk and Western Railway Company*, (6th Cir., 1997) 104 F.3d 89 and *Apitsch v. Patapsco and Back Rivers Railroad Company*, (U.S. Dist. Ct., D. Md., 1974) 385 F. Supp. 495.

The Montana Supreme Court in *Bevacqua v. Union Pacific Railroad Company*, 1998 MT 120, 289 Mont. 36, 960 P.2d 273, has likewise held that an FELA release so broadly stated that it absolved the employer of liability for all claims, "INCLUDING CLAIMS FOR INJURIES, IF ANY WHICH ARE UNKNOWN TO ME AT THE PRESENT TIME..." (960 P.2d at 276) was unenforceable due to mutual mistake about the extent of the employee's injury at the time the release was signed. 960 P.2d at 284 and 285.

In *Graham v. Atchison, T. and S. F. Ry. Co.*, (9th Cir., 1949) 176 F.2d, 819, the Ninth Circuit held that a doctor's erroneous prognostication about an employee's likely recovery was a factual mistake (176 F.2d at 824) on which the parties relied and whether intentional or unintentional the representation served as grounds for setting aside the settlement agreement. After citing other federal cases, the court held that:

> "The basis for the reasoning in these cases is that, regardless of the wording of the release, a settlement made without regard to an undisclosed physical condition cannot stand because 'the settlement intended by both the parties was for the injuries and damages disclosed and then known by the parties.' (citations omitted)" 176 F.2d at 825.

Although BNSF has argued that the nature of Patrick Cheff's condition was actually understood at the time of his settlement agreement, that is not correct. Pat's condition included the injury about which he was aware superimposed on the anatomical condition about which he, his surgeon, and BNSF were unaware and which made treatment of the injury inadvisable. As stated in *Ignacic v. Penn Central Transportation Co.*, (1981) 436 A.2d 192,

> "...The Fourth Circuit quoted Judge Learned Hand with approval: 'To tell a layman who has been injured that he will be about again in a short time is to do more than prophecy about his recovery. No doubt, it is a forecast but it is ordinarily more than a forecast; It is an assurance as to his present condition, and so understood. ...(citation omitted)'"

> "So it seems to us. To say to a worker, as in *Wooten*, 'The injury to your ankle is not permanent.' Is the same as saying, 'The present condition of your ankle is such that your injury will not be permanent.' If both parties believe this, there is a mutual mistake concerning the worker's present condition, and the release should be set aside."
>
> "We therefore conclude that a mistake concerning 'present condition' may include not only a mistake concerning the nature of the injury but also a mistake concerning the extent of the injury. ..." 436 A.2d at 196.

Judge Hand's reasoning is unassailable and should be followed in this case if the remedial purpose of the FELA is to be given effect.

The interrelationship of mutual mistake, fraud and lack of consideration as it relates to the insurance benefits bargained for in this case is illustrated by the decision of the Honorable Donald W. Molloy, U.S. District Judge for the District of Montana in *Whitten v. BNSF*, CV-98-163-M-DWM (D. Mont. 2000) which is attached hereto as App. 11. In that case, an action was brought by an injured railroad employee who settled his case after being diagnosed with a back sprain or strain. A successful recovery was prognosticated. Prior to settling his case, and while representing himself, Whitten assumed that his insurance would terminate when his job did. In reality, as in this case, his insurance would have continued for two years but he was not advised of that fact. As in this case, he asked for a clause

that would require that surgery be covered following his termination from employment and the clause was included. He signed a broad release covering unknown conditions as was done in this case. Six weeks later, he lost all feeling in his legs and was diagnosed with cauda equina syndrome. BNSF moved to dismiss his claim by summary judgment based on its prior release agreement and advanced the same arguments made in this case. Whitten moved for summary judgment striking the railroad's release defense based on mutual mistake of fact.

The railroad's motion was denied with the following explanation:

> "If the railroad knew of the continuing [insurance] coverage, then Whitten can prove that he received nothing of value in return for the release. In that case, the release would be void, because 'adequate consideration exists for a release of FELA claims when there are mutual concessions by the employee and the employer, and the employee who gives the release receives something of value to which he had no previous right.' (citations omitted)
>
> Additionally, if Whitten convinces the jury that the railroad knew of his concern about medical coverage following the termination of his employment, knew coverage would continue beyond the termination date, and used Whitten's reliance on its failure to explain that coverage would continue in order to obtain the release, then Whitten could prove fraud as well." (Order pp.7-8)

The district court granted Whitten's motion for summary judgment for the additional reason that it was undisputed that the nature of his condition at the time of his settlement was unknown to either party. (Order p.11)

On p. 19, BNSF criticizes the district court's reliance on Judge Molloy's decision in *Whitten v. BNSF*, CV 98-163-M-DWM (D. Mont. 2000) based on its argument that in *Whitten*, the plaintiff's condition was misdiagnosed. However, that is not what it argued in *Whitten*. The railroad argued in that case as it did in this case that his herniated disc condition was known and that only his prognosis had been misunderstood based on aggravation by cauda equine syndrome. In response, the court stated:

> If the railroad's position were well taken under the circumstances present here, employer's would have a strong incentive to employ doctors with sound diagnostic skills but limited powers of prognostication . . . the less that is known about the meaning of what is seen, the easier it would be to cut off claims that are a direct consequence of an injury but which do not immediately manifest signs or symptoms.

Whitten, p. 9, fn. 4.

Contrary to BNSF's assertions, there is no distinction between the rationale of the federal court in *Whitten* and the argument of the plaintiff in this case.

Those cases cited on pp. 14-17 of BNSF's brief are either distinguishable on their facts or upon actual review support the district court's decision.

Nor is it correct as suggested on p. 17 that Pat Cheff hasn't had surgery simply because he changed his mind. He did initially postpone the surgery that had been scheduled for June 30. However, his records make clear that as his condition continued to deteriorate, he attempted to reschedule the surgery which

was the reason for the more sophisticated MRI exam which disclosed the true nature of his anatomical condition.

BNSF contends that it produced evidence at the summary judgment hearing which raised an issue of fact about whether Pat Cheff would have been entitled to extended health benefits regardless of the settlement. That is incorrect. What actually happened was that at the summary judgment hearing, the court agreed that as the record stood there had been no issue of fact created regarding Pat's right to the extension of healthcare benefits beyond his last work date, even without bargaining for it as part of his settlement. (6/16/09 Tr. 83) BNSF then, without prior notice, over the plaintiff's objection and the court's reservation, was allowed to call William Renny, director of claims, who testified that when an employee settles "out of service", all insurance benefits cease. (Tr. 87) However, on cross examination, he acknowledged that BNSF Employees National Health and Welfare Plan was one of Pat Cheff's benefits,(Tr. 91) that on p. 23 of that plan (Doc. 24, Exh. 1, App. 7) that employees who terminate service as a result of disability will be covered for employee healthcare until the end of the second calendar year following termination of service (Tr. 91, 92), and that Pat Cheff didn't have to sign a settlement agreement to get that benefit (Tr. 92). The court correctly recognized, based on Renny's testimony, that Pat would have been entitled to nothing following termination only if he agreed to barter future benefits away and that that

was different from having to sign a settlement agreement in order to get future medical coverage. (Tr. 99-100) BNSF's surprise evidence was all smoke and no substance.

Finally, on p. 29 of its brief, BNSF contends that its agreement did not fail for lack of consideration because he received a substantial amount of money in exchange for the settlement agreement he was convinced to sign. However, the same argument was made in the *Whitten* decision where the plaintiff received over $46,000 for the release that he signed. Nevertheless, Judge Molloy held that lack of consideration and mutual mistake, or in the alternative fraud, had been established because the plaintiff had been advised that he would get extended insurance coverage for signing a settlement agreement even though his insurance coverage would have continued for two years without the settlement agreement. The result should be no different here where a substantial benefit bargained for already belonged to Pat Cheff.

2. INADMISSIBLE MEDICAL RECORDS

Standard of Review

This court reviews the district court's evidentiary ruling for an abuse of discretion. *Malcolm v. Evenflo Co., Inc.*, 2009 MT 285, ¶29, 352 Mont. 325, 217 P.3d 514. A district court possesses broad discretion to determine the admissibility of evidence and it will abuse its discretion only "when it acts arbitrarily without

conscientious judgment or so exceeds the bounds of reason as to work a substantial injustice." *Malcolm*, ¶29 (citation omitted)

Summary of Argument

The district court did not err when it excluded hearsay medical records for which no foundation had been established, which were inadmissible to prove apportionment or causation based on this court's prior decisions, and where questioning a lay witness in front of the jury who had already denied knowledge of their contents was solely for the purpose of circumventing this court's prior decisions.

Discussion

Because BNSF had alleged in its answer that Pat Cheff's damages should be apportioned among other causes (Doc. 8, p. 3) because the answer alleged that his work related fall was not the cause of his injury (Doc. 8, p. 2), because both apportionment of damages and proof of alternate causation require expert opinion testimony, and because the April 24, 2009, deadline for disclosure of expert witnesses had passed (Doc. 17, p. 2) without disclosure by BNSF of any opinion testimony, Pat Cheff moved, in limine, on May 22, 2009, to exclude discussion of medical records for which no foundation had been laid and which did not meet the required burden of proof for apportionment or alternate causation. (Doc. 55, pp. 5-9)

The court recognized that there was only one reason for offering the weightlifting evidence. And that was to show that Pat was injured in some way other than he alleged. (7/7/09 Tr. 54) Judge Sandefur stated that that was not permitted pursuant to *Truman* and *Olson*, *infra.* pp. 30 and 31 ,and *Bevacqua, supra.* p. 20. (7/7/09 Tr. 54) The court concluded that because no doctor had been identified by BNSF to attribute his injury to anything other than his fall at work, the evidence would be confusing and prejudicial (7/7/09 Tr. 55) and recognized that BNSF was trying to accomplish indirectly what it couldn't do directly. (7/7/09 Tr. 57)

BNSF's counsel admitted at the motion in limine hearing that there had been no physician depositions, that he didn't know what they'd say if asked about their record, and that he didn't know who was coming to trial. (7/7/09 Tr. 46)

Prior to trial, plaintiff's counsel made clear that he did not intend to offer the records in question. (Doc. 152, attach. 3)

Nevertheless, on the first day of trial, BNSF again sought admission of records for which no foundation had been laid and for which it intended to call no witness. Its argument at that time was that the evidence was admissible to prove alternative cause based on testimony given by Dr. Hollis during his deposition. (Tr. 7:16-8:7) BNSF represented as it does on appeal that Hollis testified that if he had been told about weightlifting, his opinion would have changed. (Tr. 9:8-15) It

was shown to the court that that was not true. In response to the following compound and confusing question, Hollis gave the following answer:

> Q. . . .if Pat Cheff had come into you and provided that **same history**, that is, I was weightlifting, or **I kinda slipped** and caused this to come on, and then you found herniated discs, those herniated discs would be consistent with that history; true?
>
> A. It certainly **could** be, yes, sir. (emphasis added)

(Hollis Depo. p. 63, ls. 18-24, App. 10)

It's impossible to tell from Dr. Hollis' answer whether he meant an injury "could" occur from the same history, slipping or from weightlifting. However, on redirect, after having had a chance to review the records which BNSF sought to offer, Dr. Hollis was asked the following questions and gave the following answers:

> Q. Did you have any reason to doubt the accuracy of the history that Pat Cheff provided to you?
>
> A. No, sir.
>
> Q. . . . do any of these records that you've seen change any of your opinions or conclusions set forth in your chart?
>
> A. I'd have to discuss it more with Mr. Cheff, but as of right now, I stand with my conclusions based on the history I obtained from him.

(Hollis Depo. p. 64, 65)

Dr. Hollis' testimony was the only opinion evidence given at the time of trial regarding causation.

During a later offer of proof at trial, BNSF made clear that it simply intended to offer the unsworn, out of court remarks included in the records without any further foundation. (Tr. 292-294)

The court stated that if the course of discovery had been different and this had been presented to the court in a different fashion, there would have been a different record upon which to make a decision and there might have been a different result. (Tr. 299, 300) However, under the circumstance, the court felt constrained by this court's decision in *Olson v. Shumaker, infra.* p. 31. (Tr. 300)

Applicable Law

In a thoughtful analysis of this subject in spite of ever-changing theories by the defendant for why it should be allowed to discuss otherwise inadmissible hearsay in front of the jury, the district court considered three decisions of this court which it concluded compelled its decision.

In *Truman v. Eleventh Judicial District Court*, 2003 MT 91, 315 Mont. 165, 68 P.3d 654, this court held that a defendant who claims that a plaintiff's damages should be apportioned among several causes must prove "by a reasonable medical probability" that the injury is divisible and the portion for which he or she is liable. *Truman,* 68 P.3d, ¶32.

In *Henricksen v. State*, 2004 MT 20, 319 Mont. 307, 84 P.3d 8, this court affirmed the district court's exclusion of other alleged causes for her medical condition based on the fact that the defendant did not offer an expert opinion that it was more probable than not that prior events were relevant to her present claims. (*Henricksen*, 84 P.3d 38, ¶67)

In *Olson v. Shumaker Trucking and Excavating Contractors, Inc.*, 2008 MT 378, 347 Mont. 1, 196 P.3d 1265, this court affirmed this same district court's conclusion that absent an adequate evidentiary basis for apportionment, evidence about a pre-existing psychological condition could not be offered for impeachment as a prior inconsistent statement during the cross examination of plaintiff's healthcare provider. This court held that:

> . . . a party cannot impeach a witness by inconsistent statements that are irrelevant, collateral, or immaterial. (citations omitted)
>
> A matter is collateral if the impeaching fact could not have been introduced into evidence for any purpose other than contradiction. (citations omitted)
>
> *Olson*, 196 P.3d, 1265, ¶34.
>
> In language directly applicable to this case, this court held:
>
> Shumaker failed at trial, and fails on appeal, to explain the relevancy of Olson's alleged pre-existing condition absent apportionment, except to assert that it is relevant to impeach Dr. Stivers. Evidence introduced for the sole purpose of impeaching a witness is not otherwise relevant or material. (citation omitted)

Olson, 196 P.3d, 1265, ¶36.

The court concluded that because apportionment had not been proven by a reasonable medical probability, neither was it admissible to prove causation and that therefore neither did the district court abuse its "broad discretion" when it prohibited the defendant from cross examining the plaintiff's doctor about the pre-existing condition (*Olson*, 196 P.3d 1265, ¶¶37, 38, and 39).

Olson is directly on point and controlled the same district court's exercise of his discretion in this case on an identical issue.

The district court's decision to try the case on the most reliable basis possible is consistent with other authority. See *State v. Passmore*, 2010 MT 34, ¶¶ 62-64, 355 Mont. 187, 225 P.3d 1229 (affirming a district court's disallowance of a "prior inconsistent statement" because it was unfairly prejudicial and cumulative under Rule 403 and "could have caused the jury to attach undue importance to an extraneous and prejudicial matter").

See also, *Sitton v. Cole*, 521 S.E.2d 739, 741 (N.C. Ct. App. 1999) (a prior inconsistent statement contained in an old and not properly foundationed medical record was not permitted under Rule 403 and any evidence regarding the statement was inadmissible because it was "employed as a mere subterfuge to get before the jury evidence not otherwise admissible"); and *United States v. Nickolson*, 2010 U.S. App. LEXIS 1480 (9th Cir. Cal. Jan. 22, 2010) (affirming trial court's

exclusion of a prior inconsistent statement under Rule 403 based on the potential for juror confusion and prejudice).

Montana case law has repeatedly held that "unsworn medical reports of a third person not called as a witness and available for cross examination are hearsay and inadmissible." *Pannoni v. Board of Trustees*, 2004 MT 130, ¶46, 321 Mont. 311, 323-24, 90 P.3d 438, 448; *Pickett v. Kyger*, 151 Mont. 87, 97-98, 431 P.2d 57, 62 (1968); and *Shillingstad v. Nelson*, 141 Mont. 412, 420, 378 P.2d 393, 397 (1963).

In this case, the railroad sought to prove an affirmative causation defense by relying on comments in a radiology record and a therapist note which Pat Cheff denied ever making. It relies on a hearsay exception for statements found in medical records. It goes without saying, however, that the record itself must first be admissible and standing alone it was not.

BNSF did not attempt to establish any of the evidentiary foundation from the authors of the records.

BNSF contends that all of this reasoned law was cast aside by this court's decision in *Clark v. Bell*, 2009 MT 390, 353 Mont. 331, 220 P.3d 650. However, these issues were not even addressed in *Clark*.

Clark did not address the foundation and hearsay issues raised in this case and did not change Montana law requiring that evidence be otherwise admissible

before being discussed during cross examination. *Clark* did not hold that a defendant is allowed to prove a plaintiff's injuries were caused by an alternative cause based on inadmissible hearsay without any testimony from the witness who authored the records establishing a foundation for their admissibility at trial. In fact, it held just the opposite.

In *Clark* this court held that even when offered for purposes of cross examination, "evidence is 'subject to traditional evidentiary considerations such as prejudice and relevancy,'" *Truman*, ¶31, 220 P.3d 650 at ¶23, and went so far as to note that this court has affirmed a district court's discretionary admission **or exclusion** of evidence of pre-existing injuries under the "traditional evidentiary considerations" noted by *Truman.* (citation omitted) 220 P.3d 650 at ¶25

This court in *Clark* did not say that the district court would have abused its discretion had it excluded the information used on cross examination based on some proper evidentiary objection. In fact, it cited prior case law where it affirmed doing so under circumstances similar to those in this case.

> In *McCormack v. Andres,* 2008 MT 182, ¶¶25-27, 30, 343 Mont. 424, 185 P.3d 973, we affirmed the district court's exclusion of defendant's cross examination of plaintiff's medical providers about her pre-existing injuries given the lack of a relevant connection between those injuries and current injuries. Thus, our cases have demonstrated that a defendant may submit evidence of other injuries to negate allegations that he or she is the cause or sole cause of the current injury, subject to the trial court's application of traditional evidentiary considerations. While the evidence at issue in *Truman* involves subsequent injuries,

the same rule would apply to evidence of pre-existing injuries." 220 P.3d 650 at ¶25

Clark did not address the *Olson* issue presented in this case, nor did it eviscerate the foundation requirements for medical records, the defendant's burden of proving its affirmative defenses, or the rules of evidence. It is not a basis for reversing the district courts reasoned exercise of discretion in this case.

Nor is the result any different under FELA law. *Taylor v. National R.R. Passenger Corp.*, 920 F2d 1372 (7th Cir. 1990), is an FELA case cited in *Olson* and in the district court's order in limine. In *Taylor* the court held that it is improper for a defendant to cross examine the plaintiff about other injuries based upon medical records for which there is no foundation or for which there is no proven causal connection to the injuries at issue in the case in order to imply other causes of injury that lack evidentiary support.

The district court correctly recognized that *Taylor* and *Olson* precluded the railroad from engaging in the same tactic in this case. The references to other possible causes or a preexisting back condition are "irrelevant, collateral, and immaterial evidence" if not otherwise admissible and could not be used to "impeach." *Olson*, ¶37.

3. PREJUDGMENT INTEREST

Standard of Review

Legal issues are reviewed de novo. *Tucker v. Farmers Insurance Exch.* 2009 MT 247, ¶23, 351 Mont. 448, 215 P.3d 1.

Summary of Argument

There is no legal basis for requiring that a person pay interest on money which a jury ultimately determined was only part of what was actually owed him simply because he received it prior to the jury's final determination.

Discussion

BNSF next argues that not only should it get an offset, but another $100,000 for interest on the money that it previously paid to Pat Cheff. In essence, it argues that it is entitled to interest on money that the jury found it owed Pat Cheff in the first place. Its position defies logic and common sense - not to mention the law. It is, perhaps, for that reason that no FELA law is cited in support of this novel theory.

Blacks Law Dictionary 816 (7th ed 1999) defines interest as "[t]he compensation fixed by agreement or allowed by law for use or detention of money, or for the loss of money by one entitled to use it." BNSF was not entitled to the use of money which a jury ultimately determined belonged to Pat Cheff.

Neither *Brunner v. LaCasse*, 234 Mont. 368, 371, 763 P.2d 662, 664 (1988); *Forsythe v. Elkins*, 216 Mont. 108, 116, 700 P.2d 596, 601 (1985); nor *Cady V. Burton*, 257 Mont. 529, 538, 851 P.2d 1047 (1993) stand for the proposition that

the losing party can recover interest on a previous settlement in an FELA personal injury tort action. Nor does equity support such an argument. In fact the equitable argument is that Pat Cheff who was the prevailing party should be entitled to prejudgment interest on the difference between the prior settlement and his damages since BNSF has had the benefit of the money it owed him for the past four years.

Brunner involved a real estate dispute where the District Court denied the plaintiff prejudgment interest even though the plaintiff was the prevailing party. The Court recognized that in real estate contract actions "[i]t is the general rule in this state that a party lawfully rescinding a contract is entitled 'to recover the monies they paid on the contract with interest thereon from the date of the **breach**, § 27-1-314, MCA'"(citing *Forsythe*). *Forsythe* arrived at the same conclusion based on a specific statute - §27-1-314 MCA – which pertains to real estate contracts. Neither case has anything to do with money advanced by a tortfeasor to a personal injury victim and subsequently found to be a small portion of what was actually owed.

Neither is *Cady* an FELA case and it holds only that interest is awardable in rescission action if a **breach** occurs. *Cady*, 257 Mont. at 538, 851 P.2d at 1053.

The purpose of prejudgment interest is to make the prevailing plaintiff whole and, therefore, is part of the plaintiff's actual damages, not the defendant's.

Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330, 335, 108 S.Ct. 1837, 100 L.Ed.2d 349 (1988). The FELA, however, does not authorize prejudgment interest. "The federal and state courts have held with virtual unanimity over more than seven decades that prejudgment interest is not available under the FELA." *Monessen*, 486 U.S. at 338. Therefore, the United States Supreme Court emphasized that if prejudgment interest was going to be allowed in a FELA case, it must be expressly so provided by congress. *Id* at 339. *Hogue v. Southern R. Co.*, 390 U.S. 516, 88 S.Ct. 1150, 20 L.Ed.2d 73 (1968) which is cited by BNSF does not even discuss prejudgment interest. If FELA law does not allows interest to a prevailing plaintiff, how could equity possibly require interest to a losing defendant? It obviously cannot.

IV. CROSS APPEAL

1. Contributory Negligence

Standard of Review

A district court's decision to deny motion for judgment as a matter of law is reviewed de novo. *Ammondson v. Northwestern Corp.*, 2009 MT 331, ¶32, 353 Mont. 28, 220 P.3d 1

Summary of Argument

The district court erred when it submitted the issue of contributory negligence to the jury without any factual basis to support it under FELA law.

Discussion

Unlike other cases, FELA cases involve unique rules regarding contributory negligence which, when construed with the evidence at trial, shows that the issue should not have been considered by the jury.

In FELA cases, contributory negligence is narrowly limited to situations where the railroad has evidence which proves that a railroad worker committed "a careless act or omission" that tends "to add new dangers to conditions that the employer negligently created or permitted to exist." *Kalanick v. Burlington Northern R. Co.*, 242 Mont. 45, 50, 788 P.2d 901, 904 (1990). FELA case law explains the very important distinction between contributory negligence, which is allowed, and the defense of assumption of risk, which was abolished by a 1939

amendment to the FELA. *Tiller v. Atlantic Coast R. Co.*, 318 U.S. 54, 57, 63 S.Ct. 444, 446, 87 L.Ed. 610 (1943).

At trial, BNSF called only one witness. He did not offer evidence of contributory negligence. On cross-examination, Pat Cheff acknowledged that he knew there was snow and ice in the winter. In fact, because of this, he put on the BNSF required safety footwear before walking toward the locker room. (Tr. 184) He walked toward the building, on a snowy and slushy walkway that was packed from foot traffic. He did not see any ice beneath the snow or slush. (Tr. 190, 192, 195)

Pat's supervisor, Doug Schuch, testified that on January 14, 2006, when Pat fell, the walkway was not a prohibited walkway, Pat had never been told not to use that walkway, and it was not fenced. (Tr. 323, l. 9 – 324, l. 3)

Based on the complete lack of evidence that Pat Cheff was contributorily negligent within the meaning of FELA law, he moved for a directed verdict or judgment as a matter of law on contributory negligence after the defense rested its case. (Tr. 821) The District Court denied his Motion. (Tr. 822) The jury was given instructions, over Pat's objections, (Tr. 847-48) and found him 15% negligent.

As unfortunately happened in this case, "[u]nless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name."

Since there was no act or omission which could have served as the basis for the jury's finding of contributory negligence, that part of the verdict should be reversed and the full amount of his award reinstated.

2. Offset Against Verdict

Standard of Review

The construction and interpretation of a written agreement presents questions of law reviewed to determine if the district court's conclusions are correct. *Eschenbacher v. Anderson*, 2001 MT 206, ¶¶ 12, 21, 306 Mont. 321, 34 P.3d 87.

Summary of Argument

The district court erred when it reduced Pat Cheff's recovery by $300,000 paid pursuant to a release agreement, the terms of which were so broad, that it could not possibly be determined whether the jury's award was for the same damage.

Discussion

On January 8, 2010, the District Court entered an Order granting BNSF's Motion to allow a $300,000.00 setoff against his damage award for the previous

settlement. The District Court erred because it was BNSF's burden to prove that the verdict and settlement were for the same damage. The only evidence BNSF provided was the release it prepared which was so loaded with other supposed bases for the settlement that there was no way to know how much was for his back injury.

Paragraph B lists: "[a]ny and all other claims, whether known or unknown, including, but not limited to illness, injuries, or damages from alleged exposure to noise, smoke, fumes, dust, mixed dusts, gases, chemicals, fibers, or any other type of exposure," and "any and all other claims" for:

> [A]ny accident, incident, trauma or other musculoskeletal condition, mental or emotional stress, or any other claims relating to any employment practices, labor claims, claims under the Americans with Disabilities Act, or any similar state or federal law, or any other claims resulting from or arising from my employment with Releasees, including any claim for present or future reinstatement which I hereby expressly waive and release.

Paragraph D adds claims for cumulative trauma stating:

> It is specifically understood that the release includes repetitive or cumulative motion, stress, trauma, insult, accident or injury during the time while I was employed by BNSF Railway Company, including but not limited to any claims for injuries or aggravations, progression or further development of such injuries to my whole body caused or aggravated by such repetitive or cumulative motion, stress, trauma, insult, or injury. (App. 12)

In *Busta v. Columbus Hosp. Corp.*, 276 Mont. 342, 196 P.2d 122 (1996), the Montana Supreme Court disallowed any offsets because the general verdict

precluded any way for the Court to determine whether the type of past benefits that the defendant wanted to offset were included in the jury's verdict. (See also *Tucker v. Farmers Ins. Exchange*, 2009 MT 247, 351 Mont. 448, 215 P.3d 1)

Because BNSF chose the release language and chose to state that it was for multiple conditions and that the sum was indivisible, there is no basis for offsetting the full $300,000.00 from the jury's verdict because, as in *Busta*, there is no way to tell how much was for the injury on January 14, 2006, and how much was for the many other claims listed.

The District Court erred in allowing the jury's verdict which was solely for the back injury on January 14, 2006, to be offset by a previous payment which based on BNSF's chosen language was for more than the one claim and was "indivisible" among a number of other claims. This Court should reverse the District Court's decision to allow the offset.

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Because BNSF chose the release language and chose to state that it was for multiple conditions and that the sum was indivisible, there is no basis for offsetting the full $300,000.00 from the jury's verdict because, as in *Busta*, there is no way to tell how much was for the injury on January 14, 2006, and how much was for the many other claims listed.

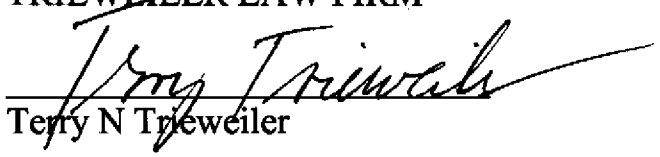
The District Court erred in allowing the jury's verdict which was solely for the back injury on January 14, 2006, to be offset by a previous payment which based on BNSF's chosen language was for more than the one claim and was "indivisible" among a number of other claims. This Court should reverse the District Court's decision to allow the offset.

CONCLUSION

For these reasons, the jury's verdict should be affirmed and the full amount of damages awards should be reinstated.

DATED this 7th day of June, 2010.

TRIEWEILER LAW FIRM



Terry N Trieweiler

CERTIFICATE OF SERVICE

This is to certify that on the 7th day of June, 2010, a true and exact copy of the foregoing document was served on the Appellant by mailing a copy, postage pre-paid to:

Randy J. Cox
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BOONE KARLBERG P.C.
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Missoula, MT 59807-9199

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the Appellee's Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Office Word 2003, is 9,999 words, including all text, excluding table of contents, table of citations, certificate of service and certificate of compliance.

Dated this 7th day of June, 2010.

Karen R. Weaver